Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-994

MARY ETHEL MORGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit.

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MARY ETHEL MORGAN,

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Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit.

The Petitioner, Mary Ethel Morgan ("Morgan"), prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals, for the Ninth Circuit, entered in this proceeding on November 8, 1977.

Opinion Below.

The Opinion of the Court of Appeals is reported in .... F.2d .... (9th Cir., 1976). Said Opinion is reproduced in the Appendix. Order denying Petition for Rehearing is further reproduced in said Appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 8, 1977. Petition for Rehearing, filed November 21, 1977, was denied on December 12, 1977. This Petition was filed within thirty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Does Morgan have a constitutional right to testify in her own behalf?

2. Can trial counsel waive Morgan's right to testify in her own behalf?

3. Does the trial court have a duty to inquire of Morgan the fact that she is waiving her constitutional right to testify in her own behalf?

4. Can the marital privilege be invoked by Morgan's co-defendant husband so as to prevent Morgan from testifying?

5. Should Morgan have been granted a severance from her co-defendant husband?

6. Is a prior state court's decision invalidating a state search warrant binding on the District Court?

Constitutional Provisions and Federal Rules Involved.

Constitutional provisions involved in the determination of this matter are the fifth and sixth amendments to the United States Constitution. Statutes involved in the determination of this matter are Rule 26, Federal Rules of Criminal Procedure; Rule 501, Federal Rules of Evidence; Rule 601, Federal Rules of Evidence. Said constitutional provisions and rules involved are reproduced in the Appendix hereto.

Statement of the Case.

Morgan, her husband, and other co-defendants, were accused by indictment in the District Court, for the Eastern District of Washington, of conspiracy to possess with the intent to distribute heroin, cocaine; possession with the intent to distribute heroin, cocaine; distribution of heroin, in violation of sections 21 U.S.C. 846 and 21 U.S.C. 841(a)(1); 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Evidence against Morgan was obtained as a result of a search of her residence in Los Angeles, California.

Prior to the commencement of her defense, Morgan's counsel, out of the presence of the jury, advised the court that because of the marital privilege she would not testify. Counsel for Morgan's husband then invoked the marital privilege. (Said portion of the record is reproduced in the Appendix herein.)

Morgan's counsel subsequently and timely submitted a proposed instruction which in substance provided that the jury be instructed that Morgan was prevented from testifying because her husband had invoked the marital privilege. Said instruction was refused. (Said portion of the record is reproduced in the Appendix hereto.)

At no time did the trial court inquire of Morgan of her desire to testify in her own behalf.

Prior to, and during the trial, numerous motions for severance on behalf of Morgan were made and renewed; all of said motions were denied.

The jurisdiction of the District Court was granted pursuant to 18 U.S.C. 3231.

REASONS FOR GRANTING THE WRIT.

1. Defendant in a Criminal Prosecution Has an Unqualified Constitutional Right to Testify in Her Own Behalf.

Morgan, as a defendant in a criminal matter, should have been allowed the unfettered choice to exercise her constitutional right to testify in her own behalf. The Ninth Circuit decision, by qualifying this right by requiring an offer of proof had decided an important question of federal law which has not been, but should be, settled by this Honorable Court. Further, it is respectfully submitted said determination by the Ninth Circuit is contrary to this Honorable Court's decisions in the cases of *Faretta v. California,* 422 U.S. 806; *Harris v. New York,* 401 U.S. 222; *Brooks v. Tennessee,* 406 U.S. 605; and *Ferguson v. Georgia,* 365 U.S. 570. As determined by said decisions, the disqualification of a defendant to be a witness in her own behalf deprived a defendant of due process of law pursuant to the fifth amendment to the United States Constitution, and, further deprived the defendant of the effective assistance of counsel and the right of obtaining witnesses in her favor pursuant to the sixth amendment to the United States Constitution.

No offer of proof or other qualification can, or should be imposed with respect to the right of a criminal defendant to testify; acknowledging, of course, that said testimony is governed by the same rules of evidence as applied to any witness in a criminal case.

Morgan's husband, by invoking section 501 of the Federal Rules of Evidence, invoked the marital privilege preventing Morgan from testifying. It is submitted that to insure a defendant due process and preserve the

integrity of the true finding process involved in a criminal trial, if alternative procedures will avoid the exclusion of evidence, said procedures should be adopted. In the instant matter it is submitted that Morgan should have been granted a severance, by virtue of her being joined as a co-defendant with her husband, the ban of the privilege a threat to her right to testify. The Ninth Circuit sanction of this procedure has determined an important issue of federal law which should be settled by this Honorable Court.

2. The Trial Court Had a Duty to Inquire of Morgan if She Wished to Testify.

At no time did the trial court inquire of Morgan of her desire to testify. If misled by trial counsel's statements, the tendered instruction crystalized any inconsistency as to Morgan's desire to testify at a time when the same could have been corrected. The Ninth Circuit in its decision has determined an important issue of federal law which should be settled by this Honorable Court that there was no duty on the trial court to personally inquire of Morgan if she desired to testify. Viewing the record in favor of the government, at best it is ambiguous, a record, in fact, equivalent to a silent record.

The fact that the constitutional right to testify coexists with the privilege against self-incrimination should not give rise to a presumption of the waiver of either, a situation clearly analogous to this Honorable Court's decision in *Boykin v. Alabama,* 395 U.S. 238.

However, if the trial court sustained Morgan's husband's claim of the marital privilege, further inquiry would be a futility, having determined that she would be precluded from testifying.

The result is the same. Morgan was prevented from testifying in her own behalf, her lips were sealed from testifying to what Morgan inferentially believed would establish her innocence. If her testimony raised a reasonable doubt in the minds of the jury, an acquittal is a certainty.

3. Morgan, and Not Her Husband, Was the Holder of the Marital Privilege.

It is respectfully submitted that this Honorable Court reexamine its decision in *Hawkins v. United States,* 358 U.S. 74, and that the position urged by the government in said case be adopted in that the policy behind said marital privilege is not advanced by allowing the defendant spouse to invoke it. Rather, the testifying spouse should be the party to invoke said privilege in that if the marriage has deteriorated to such an extent that a spouse will voluntarily testify in her own defense, against another, is, in fact, a strong indication that the marriage is already gone. In this regard, Morgan, and not her husband, should have been determined the holder of the privilege.

4. The State Court's Decision Was a Final Determination of the Search Warrant's Validity.

The California Superior Court determined that a search warrant issued under California law was insufficient in a prosecution involving Morgan's husband. The sufficiency of the warrant was relitigated before the district court and the evidence admitted. It is respectfully submitted under our federal system due

regard should be afforded a State's determination that a state magistrate improperly issued a search warrant and therefore this Honorable Court should reconsider its decisions in *Elkins v. United States,* 364 U.S. 206 and *Rios v. United States,* 364 U.S. 253.

Conclusion.

For the above reasons a writ of certiorari should issue to review the Judgment and Opinion of the Ninth Circuit.

Respectfully submitted,

ALBERT C. GARBER,
J. M. GORSHAN,
By J. M. GROSHAN,
Attorneys for Petitioner.

APPENDIX.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Filed Nov. 8, 1977.

United States of America, Plaintiff-Appellee, v. Vernice Garrett, Defendant-Appellant. No. 76-2482.

United States of America, Plaintiff-Appellee, v. Mary Ethel Morgan, Defendant-Appellant. No. 76-2585.

United States of America, Plaintiff-Appellee, v. James Kinsey, Defendant-Appellant. No. 76-2858.

United States of America, Plaintiff-Appellee, v. Jackson Morgan, Defendant-Appellant. No. 76-3137.

Appeal from the United States District Court for the Eastern District of Washington.

BEFORE: DUNIWAY and HUFSTEDLER, Circuit Judges, and WILLIAMS,* District Judge.

HUFSTEDLER, Circuit Judge:

Defendants Jackson and Mary Ethel Morgan, Vernice Garrett, and James Kinsey appeal from their convictions on multiple counts for conspiracy to possess and possession of narcotics in violation of 21 U.S.C. §§ 846, 841(a)(1). Mary Ethel Morgan and Garrett received concurrent sentences of 15 years' imprisonment and 25 years' special parole; Kinsey concurrent sentences of 5 years' imprisonment and 25 years' special parole. Jackson Morgan received enhanced sentences of 30 years' imprisonment, 25 years' special parole, and a $25,000 fine pursuant to 21 U.S.C. § 841(b)(1)(A).

Between May, 1975, and November, 1975, a federal narcotics agent and a paid informant made seven sepa-

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*Honorable David W. Williams, United States District Judge, Central District of California, sitting by designation.

rate purchases of heroin from Kinsey in Pasco, Washington. These purchases totaled approximately twelve ounces of heroin and were paid for with marked government money. Close ground and aerial surveillance were maintained by federal narcotics agents throughout these transactions. On each of these occasions, Kinsey was observed leaving his apartment after receiving payment from government agents, traveling by car directly to the residence of Garrett, Kinsey's cousin, at 616 North Beech Street, remaining there for a short time, and then returning to his apartment before completing the transaction.

During the course of the transactions, Kinsey made various statements regarding the source of his supply. He claimed that his relatives were his source, that his local source, a woman in Pasco, occasionally also referred to as Vernice, obtained the heroin from her sister in Los Angeles, that the woman in California and her husband, the master of the heroin operation, owned and lived in an 18-unit apartment building in Los Angeles, that the woman in California traveled a great deal on behalf of her husband who was restricted to Los Angeles on parole due to a prior narcotics conviction, and that the husband once escaped being caught in a hotel room with $150,000 worth of heroin by flushing it down the toilet.

During late September and early October, 1975, when Garrett was in Alaska to be with her husband, Mary Ethel Morgan, Garrett's sister, and her vehicle with a California license plate, were observed on many occasions in the Pasco area and in front of the Garrett residence. On October 1, 1975, Mary Ethel's vehicle was also observed parked at the Garrett residence during one of the heroin transactions.

Pursuant to warrant, the Garrett residence was searched on November 15, 1975, the date of an agreed heroin purchase from Kinsey. Items seized during the search include 110 grams of heroin, 5 grams of cocaine, a quantity of a cutting agent, and documents containing notations which referred to quantities of heroin and cocaine and the names Ethel, Jack, Jessie, and Vernice.

Prior to October 21, 1975, Jackson Morgan, released from prison on parole in December, 1974, lived with his wife, Mary Ethel, at Apartment 7, 4048 Gelber Place, Los Angeles, an 18-unit apartment building owned by them. In February, 1975, Jackson was arrested by the Los Angeles Police Department ("LAPD") on a narcotics charge, which was later dismissed. On October 21, 1975, pursuant to state warrant, the Morgan residence in Los Angeles was searched by LAPD. Among the items seized were 300 grams of heroin, 21 grams of cocaine, cutting agents, a quantity of plastic baggies, a heat sealer, and a sum of $8,960. Some of the heroin was found on Jackson Morgan's person and some of the money was marked government money used in the October 1 heroin purchase from Kinsey in Pasco.

Following a joint jury trial, the appellants were found guilty on all of the counts charged. Garrett's husband was acquitted on six of the counts and a mistrial was declared as to the remaining counts when the jury was unable to reach a verdict.

I

Counsel for Jackson Morgan contends on appeal that the district court erred in failing to suppress the evidence seized in the October 21 LAPD search of

the Morgan residence because the same evidence was suppressed in the Superior Court of Los Angeles, where Jackson Morgan was charged with narcotics violations under state law.

Under *Elkins v. United States,* 364 U.S. 206 (1960) and *Rios v. United States,* 364 U.S. 253 (1960), the district court was correct in making an independent inquiry on the constitutional validity of the state search, irrespective of whether there had been such an inquiry by the state court, or how such an inquiry had turned out. (*United States v. Bedford,* 519 F.2d 650 (3d Cir. 1975).) Counsel for Jackson Morgan, however, strenuously contends that *Elkins* was overruled, at least implicitly, by *Stone v. Powell,* 428 U.S. 465 (1976).

Stone v. Powell, supra, held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." (*Id.* at 494.) Counsel for Jackson Morgan argues that "once the search and seizure claim has been decided against the state, no justification exists for another review of the issue by the federal courts," and that "it is fundamentally unfair to fashion a rule whereby a defendant who loses a search and seizure claim in state court cannot relitigate in federal court even though such a procedure is permissible for a prosecutor."

This reasoning is faulty for several reasons. First, unlike a *habeas corpus* proceeding, there is no relitigation here. The state suppression proceedings are over, and the federal court did not reopen them. The validity of the state hearing is not at issue. Second, the rationale

advanced for *Stone v. Powell* does not require invalidation of *Elkins* and *Rios* in the manner suggested by appellant. The Court's skepticism in *Stone v. Powell* about the deterrence from the application of the exclusionary rule in a federal *habeas corpus* proceeding cannot be advanced to support the exclusion in the federal courts of evidence seized by state officials when that evidence has been excluded in the state court. Third, while the Court in *Stone v. Powell* rejected arguments based upon "mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights" (*id.* n.35 of 493-94), it has not sanctioned wholesale substitution of state court judgments for that of the federal courts where federal constitutional rights are concerned. We therefore adhere to the *Elkins-Rios* rule and examine the constitutional sufficiency of the state search warrant attacked by the appellant as violative of the Fourth Amendment guarantees under *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969).

The affidavit,[1] supporting the state search warrant, stated that the affiant, a police officer, received a

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[1]"I am John M. Harrington, I am an officer of the Los Angeles Police Department with grade of Investigator I. My serial number is 13101. I am presently assigned to Central Operations Division as a narcotic investigator. I have been a police officer for over 8½ years and in my present assignment for 20 months. During my assignment I have conducted and participated in numerous investigations and arrests involving narcotic sales and trafficing [*sic*] of narcotics. In the course of my assignment I have become familiar with the manner in which narcotics are transported, packaged and sold in the county of Los Angeles. I have also qualified as a Narcotics Expert in Municipal and Superior Courts in excess of 200 times.

(This footnote is continued on next page)

tip from an unnamed informant that he had made several recent purchases of heroin at Jackson Morgan's residence, that, while there, the informant had observed heroin at the premises, that Jackson Morgan stored heroin in his residence and in his car. The informant also gave a detailed description of the residence, the car, and some personal and family attributes of Jackson Morgan. The affidavit further averred that the information regarding the residence, the car, and personal and family attributes were personally verified by the affiant. The affiant also conducted an inquiry into Jackson Morgan's record and reputation as a narcotics dealer. The inquiry showed that Jackson Morgan was known as a narcotics dealer to three other police offi-

"During the latter part of October 1975, your Affiant received information from Informant whom I had reason to believe was reliable. The informant told me the following: A male, Negro known to informant as Jack Morgan described as a male, Negro, grey, brown, 5-11, 250, 55 years old, was selling large quantities of heroin, i.e., $50 raw ¼, ½ and full pieces, out of his residency 4048 Gelber Place #7, Los Angeles. Informant states suspect Morgan keeps his stash in his apartment, a storage room, car port and automobile. Informant described suspect's automobile as 1968/69 Cadillac, 4 door, blu and that suspect parks vehicle either on street or in carport. Informant states suspect lives in apartment #7 with wife Ethyl and that suspect and wife are not users. Informant went on to state that he had purchased heroin from suspect several times in past 12 days and every time informant has been at suspects location, the informant has seen heroin. The informant is a heroin user.

"On October 21, 1975, 1430 hours, your Affiant went to 4048 Gelber Place to conduct a surveillance. At location your Affiant observed a 1968 Cadillac, blu, California License #VQN771. Vehicle parked at curb in front of location and a male, Negro, 5-11, 250, grey, brown, 55 years old, exited vehicle and entered apartment complex 4048 Gelber Place. Suspect entered apartment #7. Your Affiant observed suspect to have a noticable [*sic*] limp.

"Your Affiant returned to Central Narcotics where he ran license VQN771, it returned and show a 1968 Cadillac, registered owner Morgan Jackson, 4048 Gelber Place #7, Los Angeles. Your Affiant ran suspect Morgan for traffic history;

cers, was arrested on a narcotics charge on February 17, 1975, and was under active investigation by two narcotics officers on May 19 and June 25, 1975.

To be constitutionally sufficient, an affidavit based solely upon an unnamed informer's tip must meet the *Aguilar-Spinelli* two-prong test: (1) The affidavit must set forth some underlying circumstances which reveal the source of the informer's information pertaining to the criminal activity, and (2) the affidavit must present sufficient objective evidence to enable the magistrate

the return showed driver's license #N4554844, date of birth 1-27-20, Morgan Jackson, 4048 Gelber Place #7, Los Angeles. Affiant then ran suspect Morgan for criminal record; the return showed prior narcotics arrests last being 2-17-75 by 77th Street Division Narcotics. Suspect was arrested from 4048 Gelber Place #7 for 11351 H&S, possession of heroin for sale with a large quantity of heroin seized. Your Affiant contacted Investigator III Magga of Administrative Narcotics who informed your Affiant that suspect Morgan was a trafficer [*sic*] of large quantities of heroin from 4048 Gelber Place #7. Suspect Morgan lived with his wife Mary *Ethyl* and that he was a male, Negro grey, brown, 5-11, 250, 55 years old, and walked with a limp. Vehicle described as 1968 Cadillac, 4 door, blu, California License VQN771. Investigator III Magga showed several photos to Affiant who identified suspect Morgan. Affiant was also told that active investigations by Investigator Stanley and Fra of Administrative Narcotics Division were conducted on 5-19-75 and 6-25-75 on suspect Morgan.

"From the foregoing investigation as above details [*sic*] and from your Affiants experience, your Affiant concludes that Jackson (Jack) Morgan is presently dealing narcotics in the Los Angeles area. It is your Affiant's opinion, based on his experience, that 4048 Gelber Place #7, Los Angeles, storage room, car port and described vehicle, there is presently contained narcotics and narcotic paraphernalia.

"Your Affiant has confirmed all information received from informant finding information to be precise, direct and truthful.

"Your Affiant requests that the warrant contain a directive that it may be served any time of the day or night, in that it is your Affiant's opinion based on training and experience as set out in the Affidavit that narcotic sales continue during the daytime and the nighttime hours and your Affiant believes if service of this warrant is delayed until the daytime hours the suspect will no longer be in possession of any contraband."

to conclude that the unnamed informant is credible or that his information is reliable.

It is evident that the first prong of the *Aguilar-Spinelli* test is met here as the informant was relating his own personal observations and participation in the alleged criminal activity. There is no direct objective evidence in the affidavit on the credibility and the reliability of the unnamed informant. The second prong of the *Aguilar-Spinelli* test can, however, be met by circumstantial evidence on the trustworthiness of the tip. (*United States v. Harris,* 403 U.S. 573 (1971); *Draper v. United States,* 358 U.S. 307 (1959).) In *Draper,* independent corroboration of the informant's tip by a law enforcement officer was held to be sufficient circumstantial evidence adequate to give credence to the tip. The affiant here had independently corroborated the informer's tip to the fullest possible extent other than the fact that heroin was stored at the premises. Moreover, compared to *Draper,* the information that had been corroborated here appeared to have a closer nexus to the alleged criminal activity and was given by a person more directly involved in the alleged criminal activity. Both these factors were deemed important by a plurality of the Court in *Harris* in weighing the probative value of the circumstantial evidence. Compared to *Harris,* the factual basis for the defendant's reputation in the alleged criminal activity here is more substantial and less dated. In *Harris,* the informant's tip was not independently corroborated at all. To be sure, it would have been better if the police arrest record and the investigative reports about the appellant had been made part of the warrant application. Viewed in the light of the *Draper-Harris* decisions, however, the affidavit here has met the constitutional minimum.

II

Appellant Garrett also challenged the constitutional sufficiency of the Pasco search warrant on the ground that it was signed by a state judge of record, rather than a federal magistrate, that it failed to designate the name of a federal magistrate to whom the search warrant return was to be made, that it did not show probable cause, and that it failed to particularly describe the things to be seized. These contentions have no merit. The underlying facts of the alleged criminal activity in Pasco were personally observed by many law enforcement officers over a continuous period of surveillance. These facts, as set forth in the supporting affidavit, were more than sufficient to establish probable cause. The description in the warrant of the items to be seized is sufficiently specific to meet the commands of the Fourth Amendment. (*Quigg v. Estelle,* 492 F.2d 343 (9th Cir. 1974).) The issuance of a federal warrant by a judge of a state court of record is expressly authorized by Federal Rules of Criminal Procedure 41(a). Since the search warrant return was in fact made, within two days of the search, to a federal magistrate, no reversible error was committed. (*United States v. Burke,* 517 F.2d 377 (2d Cir. 1975).)

III

The appellants contend that the district court committed various errors in admitting prejudicial evidence, and that there was insufficient evidence to support the jury verdict. These contentions do not present colorable claims unless there is no conspiracy. The Government, however, presented ample evidence of a conspiracy to distribute heroin at the trial and of each appellant's connection to it. Several sales of heroin were made by Kinsey, who was observed to obtain

the heroin from Garrett's home in Pasco. Mary Ethel Morgan was seen in Garrett's home during one purchase while Garrett was away in Alaska. Marked government money used in the purchase of heroin in Pasco, Washington, was found in Jackson Morgan's residence in Los Angeles. Documents and records seized from the Garrett residence evidenced a scheme of distribution by the appellants. With this evidence of a conspiracy to distribute heroin, it was error to admit, under the co-conspirator hearsay exception, the extrajudicial statements of Kinsey at the joint trial, further implicating all the appellants in the conspiracy. (*Carbo v. United States,* 314 F.2d 718, 735-38 (9th Cir. 1963); *Krulewitch v. United States,* 336 U.S. 440 (1949).) Taken together, the evidence is more than sufficient to support the convictions.

IV

The appellants contend further that the district court should have severed their joint trial because the court was informed by Mary Ethel Morgan that her husband, Jackson Morgan, would exercise, if necessary, marital privilege to prevent her from testifying. The district court was not informed of the nature of her purported testimony. Mary Ethel Morgan did not testify at trial, nor did she attempt to. Logically extended, the appellants' contentions would mean that a joint trial involving the husband and wife as codefendants can only be conducted with their consent. This is simply not the law. "The mere joint trial of husband and wife does not require severance where, as here, the Government did not introduce the statement of one to incriminate the other." (*United States v. Figueroa-Paz,* 468 F.2d 1055, 1057 (9th Cir. 1972).)

V

Appellant Jackson Morgan received an enhanced sentence as a second offender pursuant to 21 U.S.C. § 841(b)(1)(A). Prior to trial, the Government filed an information with the district court stating in writing the prior convictions to be relied upon as required by 21 U.S.C. § 851(a)(1). The district court did not comply with 21 U.S.C. § 851(b), which requires the district court "after conviction but before pronoucement of sentence [to] inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and [to] inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence."

We agree with the Fifth Circuit that failure to comply with Section 851(b) renders the sentence illegal. (*United States v. Cevallas,* 538 F2d 1122 (5th Cir. 1976).) As *Cevallas* explains, "unless the Judge complies with § 851(b) in imposing an enhanced sentence, the legal requirements for the lawful imposition of an enhanced sentence have not been met, and thus the enhanced sentence in fact exceeds the normal statutory maximum which the Judge is otherwise authorized to impose." (*Id.* at 1128.)

We do not discount the burden that compliance with Section 851(b) places on seriously backlogged district courts, but we also recognize that the "quantum jump in the severity of the sentence" (*United States v. Cevallas, supra,* 538 F.2d at 1128) that Congress has forced district courts to impose under this enhancement statute means that a defendant faces draconian

penalties if he has any valid priors. Moreover, the statute forecloses collateral attack on the validity of his priors for enhancement purposes if the defendant has been given the appropriate opportunity to challenge them under this statutory scheme. We therefore vacate Jackson Morgan's sentence and remand for resentencing in full compliance with the procedures of Section 851 (b).

We have considered the remaining contentions of the parties, and we have concluded that they have insufficient merit to require comment.

The convictions are affirmed. Jackson Morgan's sentence is vacated, and his cause is remanded to the district court for resentencing.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Mary Ethel Morgan, Defendant-Appellant. No. 76-2585.

Order.

Filed: Dec. 12, 1977.

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and WILLIAMS,* District Judge.

The petition for rehearing filed November 21, 1977 is denied.

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*Honorable David W. Williams, United States District Judge, Central District of California, sitting by designation.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 26, Federal Rules of Criminal Procedure

"In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence or other rules adopted by the Supreme Court."

Rule 501, Federal Rules of Evidence

"Except as otherwise required by the Constitution of the United States or provided by Act

of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with state law.

Rule 601, Federal Rules of Evidence

"Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a crime or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law."

Reporter's Transcript, pp. 1287-1289

THE BAILIFF: All rise, Court is now reconvened following a recess.

MR. MAXEY: Your Honor, before you bring in the jury, I would like to—outside the presence of the jury, I have a matter that I would like to call to your attention in the interests of protecting Counsel from the future difficulties.

THE COURT: Yes.

MR. MAXEY: I instructed my client, Mary Ethel Morgan, and she has agreed with me, that she would be a witness in this case, but she—her husband refuses to allow her to testify. And although, under the latest Federal seminar rules, you remember, that case, we discussed, admitted—I am in a dilemma over which I cannot handle it, and in view of this expressed objection, she refuses to testify, but I am calling it to the Court's attention, and there is no inappropriateness on the part of Counsel about this.

THE COURT: Well, this creates a problem. There are probably two different aspects to this privilege. One has to do with a confidential communication, and, of course, I don't know whether that is involved in your problem or not. And then there is a general communication in testimony between spouses. I think probably each spouse has a right to raise the question.

MR. MAXEY: Well, it has been raised, and I don't want to be left with the jury in your considered judgment, I would ask that it be called to the jurors' attention, but I leave it up to you. You know the dilemma I am in, and I am not going to call her in the presence of the jury because then it might create a mistrial, and that is why I am calling it to your attention now.

THE COURT: Well, of course, I will instruct the jury that the defendant is not required to take the stand under any circumstances, and they are not to draw any inferences from that.

MR. MAXEY: Yes. But that only answers half my problem.

THE COURT: I recognize your dilemma. I will consider—I don't know if it is proper to give that instruction or not, but I will consider that. I recognize the place you find yourself in.

MR. MAXEY: Well, in particular, Judge, without arguing again, any part of this case, it is—it would be unusual nature on a husband and wife relationship, in a conspiracy situation we have ourselves in,—

THE COURT: Yes, I am very much aware of that.

MR. MAXEY: All right, I will move right along.

MR. ETTER: Judge, we object on the record on behalf of Jackson Morgan, refusing to allow Mrs. Morgan to testify. I urge the privilege on Jackson, we have through his attorney, thank you.

Reporter's Transcript, pp. 1592-1593

THE COURT: All right, the Bailiff will bring in the jury.

MR. MAXEY: Oh, Judge, I take it you rejected my instruction.

THE COURT: Pardon.

MR. MAXEY: I guess you rejected the one that I offered the other day of privilege, the one that directed it to Mary Ethel Morgan.

THE COURT: Well, we will have a chance to talk about that or two or three other things before we get to the instructions. We will have a recess sometime.

And you handed me a new one, this morning, Mr. Vovos?

Clerks Record, p. 259

While the Court has instructed you that the defendant is not required to testify and no inference can be drawn therefrom; the Court must also advise you that a spouse can not testify against his or her spouse without permission of the other spouse. That in this case, Mary Ethel Morgan attempted to be called as a witness for and on her behalf, but was restrained from testifying by the exercise of the husband-wife privilege on the part of her husband, Jackson Morgan.